16.11.2023
Item No.03
RP/AN
Ct. No.1

MAT 1854 of 2023
+
IA No.CAN 1 of 2023
National Stock Exchange of India Limited & Anr.
Vs.
The Calcutta Stock Exchange Limited & Ors.

Mr. Abhrajit Mitra, Sr. adv.
Mr. Satadeep Bhattacharya
Mr. P. Kamesh
Mr. Taruj Kakrania
Mr. Ishan Agarwal
.....for the Appellants/NSE

Mr. Deepan Kumar Sarkar
Mr. Saptarshi Banerjee
Ms. Ashika Daga
Mr. Jishnu Roy
..for the respondent/CSE

Mr. Tilak Bose, Sr. adv.
Mr. Rupak Ghosh
Mr. P.K. Dutt
Mr. S.K. Dutt
Mr. S. Banerjee
..... for SEBI

1. This intra-Court appeal by the National Stock Exchange of India Limited (in short "NSE") & Anr. is directed against the impugned order granted in WP 19816 of 2023 filed by the Calcutta Stock Exchange Limited (in short "CSE") & Ors. In this judgment and order the parties shall be referred to as per the rank in the writ petition.
2. The CSE had filed the writ petition challenging the communication dated 18th July, 2023 issued by NSE, which is in the form of a notice of withdrawal of arrangement made pursuant to Section 13 of the Securities Contracts (Regulation) Act, 1956

(hereinafter referred to as the said "Act"). This agreement was entered into between NSE and the writ petitioner/CSE. The learned Single Bench has granted an order of stay of the notice impugned in the writ petition dated 18th July, 2023 and aggrieved by such order NSE has filed the present intra-Court appeal.

3. We have elaborately heard the learned advocates appearing for the parties.

4. The agreement between NSE and CSE was entered on 28th September, 2011. In preamble portion of the said agreement, namely, Clause 3, it is stated that the proviso to Section 13 of the said Act enables contracts in securities to be entered into between members of two or more stock exchanges subject to such terms and conditions as may be stipulated by respective stock exchanges with prior approval of SEBI. Clause 4 states that NSE and CSE intend to enter into an arrangement pursuant to Section 13 of the said Act to enable CSE members to trade on NSE platform in the securities listed and permitted on NSE and to provide nationwide access to CSE listed securities. Clause 20 of the agreement states that this agreement will be subject to the prior approval of SEBI and any modification to the agreement shall be carried out with prior approval of SEBI only. Sub-Clause (b) of Clause 20 states that

NSE and CSE agree to comply with all the conditions stipulated by SEBI from time to time. Clause 22 deals with terms of termination and it states that the agreement only represents a basis of understanding between NSE and CSE subject to necessary approvals. This agreement shall remain in force for a period of five years from the date of signing and will then be automatically renewed for another period of five years unless terminated by either party by giving six months notice to the other party in writing before the expiry. It is not in dispute that the agreement came to an end on October 2021. On the expiry of second five year period, admittedly no renewal had been granted or no fresh agreement has been entered into between NSE and CSE.

5. The writ petitioner/CSE had filed a writ petition challenging the regulation dated 20th July, 2012. The said writ petition was dismissed by the learned Single Bench and an intra-Court appeal, being MAT 772 of 2016, has been filed and the same is pending. In the said appeal there is an interim order to the effect that even if the valuation process is completed in terms of the letter dated 6th June, 2016 SEBI shall not take any decision till the next date of hearing. We are informed that the appeal is set down for hearing on 30th November, 2023.

6. The learned Single Bench had considered the objections raised by the appellant/NSE with regard to the maintainability of the writ petition on the ground that there is an arbitration clause in the agreement between the parties and apart from that the agreement between the parties is not a statutory contract and no writ petition is maintainable. The learned Single Bench had considered the said submission and has recorded a finding in page 8 of its order holding that the arbitration clause does not operate as an absolute bar to entertain a writ petition. In the preceding paragraph in page 8 the learned writ Court has opined that the allegations pertain to the alleged arbitrary and mala fide action of the NSE in issuing the impugned notice and, as such, the nature of allegations levelled against a public body, that is NSE, empowers the Court to entertain the writ petition and exercise its judicial review, if found to be a fit case otherwise.

7. After we have heard the submissions of the learned senior advocate for the appellants/NSE, we are of the view that the observations made by the learned writ Court in page 8 of the impugned order are prima facie in character. The allegations of alleged arbitrariness and malafide action has to be decided in the writ petition. Therefore, the observations made in page 8 of the impugned order can at best be

construed to be prima facie observations in aid of the conclusion that the Court has arrived at. Therefore, the findings rendered by the learned writ Court that the arbitration clause in the agreement does not operate as an absolute bar to entertain a writ petition cannot be construed to be a final finding on fact and law which can be done only after affidavits are filed and the parties are heard in the matter. The larger issue would be as to whether by virtue of an interim order the writ petitioner/CSE can continue to operate when the rights of the parties under an agreement, which, admittedly, had expired in October 2021 and has not been renewed thereafter. In fact, request for renewal has also been rejected by NSE as could be seen from the communication/email dated 26th July, 2023. The writ petitioner/CSE without accepting the allegations made against them in the email dated 25th July, 2023 requested the NSE to continue the trading arrangement under Section 13 of the act till 28th September, 2023 for squaring off or closing off the outstanding derivatives done under Section 13 of the agreement. The reply has been sent by the NSE to the CSE on 31st July, 2023 expressing their inability to grant extension as requested by them in the email dated 26th July, 2023. The writ petitioner/CSE was once again requested to ensure

that all open position are closed out/squared off on or before August 18, 2023 as mentioned in NSE's communication dated July 18, 2023 which is impugned in the writ petition.

8. The larger question would be as to whether an interim order can be granted which has an effect of nullifying the statutory provisions. Before considering the said issue we may refer to the prayers sought for in the writ petition. Essentially, the prayer sought for in the writ petition is to declare the letter dated 18th July, 2023 issued by NSE as illegal, discriminatory and unconstitutional. The interim order sought for in the writ petition is to stay the said letter/notice dated 18th July, 2023. As pointed out earlier the parties, namely, the writ petitioner/CSE as well as NSE were fully aware of the agreement/arrangement dated 28th September, 2011. Section 13 of the said Act deals with contracts in notified areas illegal in certain circumstances. Section 13 states that if the Central Government is satisfied, having regard to the nature or the volume of transactions in securities in any State or States or area that it is necessary so to do, it may, by notification in the Official Gazette, declare this section to apply to such State or States or area and thereupon every contract in such State or States or area, which is entered into after the date of

the notification otherwise than between the members of a recognized stock exchange or recognized stock exchanges in such State or States or area or through or with such member shall be illegal. The proviso in Section 13 assumes importance in the case on hand. It states that any contract entered into between the members of two or more recognized stock exchanges in such State or States or area shall be subject to such terms and conditions as may be stipulated by the respective stock exchanges with prior approval of SEBI. Clause (ii) of Section 13 of the said act deals with prior approval of SEBI. This aspect of the matter is beyond doubt and the writ petitioner/CSE was fully aware of the of the same as it is clearly stated in the agreement that they intend to enter into the arrangement pursuant to Section 13 of the said Act to enable contracts in securities to trade on NSE platform in securities listed and permitted on NSE and to provide nationwide access to CSE listed securities. Admittedly, after October 2021 the agreement has not been renewed and the question of taking prior approval in the facts of the case does not arise. Furthermore, the learned Single Bench opined that SEBI has acquiesced to the acts of the NSE as well as the writ petitioners, treating the agreement to be a continuing one, for quite a long

period, at least for about two years after the year 2021 when it last expired, without taking any action in that regard. In view of such, the concept of acquiescence cannot be brought in, more particularly, when there is a clear statutory mandate that prior approval of SEBI is required for carrying on such agreement. Therefore, we do not agree with the said finding rendered by the learned Single Bench in the impugned order. The apprehension of the writ petitioner/CSE is that if the interim granted in favour of the writ petitioner/CSE is vacated the appeal filed by them, being MAT 772/2016, will be rendered virtually infructuous. The writ petitioner/CSE need not have apprehension as admittedly the agreement, which is the subject matter of controversy in the present case, was entered into much prior to the communication dated 20th July, 2012 which was the subject matter of challenge in the writ petition, which was dismissed and the appeal, being MAT 772 of 2016 is pending. Therefore, by way of abundant caution we clarify that observations made in this judgment and order can have no impact on the proceeding, which is pending before the Hon'ble Division Bench in MAT 772 of 2016.

9. As observed earlier, the question of maintainability has to be heard on merit, especially, when the stand

of the NSE is that the agreement between the parties is not a statutory contract though there may be a statute enabling such contact. Apart from that it is submitted that several decisions on the said point which held that in such cases a writ petition could not be maintainable. As observed by us earlier, at best the finding rendered by the learned writ Court in the impugned order stating that arbitration clause does not operate as an absolute bar for entertaining a writ petition can only be a prima facie finding and cannot be taken to be a final conclusion on the finally concluded issue. Therefore, we are of the view that granting an interim order in the present case would tantamount to allowing a writ petition at an interlocutory stage, more particularly when it falls foul of the statutory mandate under proviso (i) to Section 13 of the said Act.

10. For the above reasons, we are inclined to vacate the interim order granted by the learned Single Bench. Accordingly, the appeal is allowed and the interim order passed by the learned Single Bench dated 18th August, 2023 is set aside. The respective parties in the writ petition are directed to file affidavit-in-opposition not later than 4th December, 2023 and reply, if any, to be filed not later than 8th December, 2023. The registry is directed to list the writ petition before the concerned Single Bench in

the week commencing on and from 11th December,2023 with a request to the learned writ court to assign an early date for hearing of the writ petition subject to cooperation of the learned advocates for the parties.

11. Considering the difficulty pleaded, the time to square off the transactions on derivatives by NSE by their communication dated 31st July, 2023 stands extended till 28th November, 2023. This order and direction shall be made known to the members of CSE by posting the same in its official website.

12. In the result, the appeal and the application are disposed of.

(T. S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA, J.)